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In The
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *ET AL.*,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *ET AL.*,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *ET AL.*,

Petitioners,

v.

STATE OF HAWAII, *ET AL.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth And Ninth Circuits

AMICUS CURIAE BRIEF OF PROFESSOR VICTOR WILLIAMS IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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TABLE OF CONTENTS

Page

Table of Authorities iv

Interest of *Amicus Curiae* 1

Summary of the Argument 3

Argument 6

I. Nonjusticiable Political Question: Travel Freeze Is Integral to New Executive's Foreign Policy Reorientation and Terror War Strategy; Policy Choices Permeate Respondents' Challenges 9

II. *Baker* Formulations Inextricably Intertwined with Travel Freeze Analysis 14

III. D.C. Circuit's *El-Shifa Pharmaceutical* Political-Question Analysis: President Bill Clinton's Allegedly Anti-Muslim Defamatory Statements and Actions Against Muslim Aliens Abroad (Sudan), Ruled Not Justiciable 18

IV. D.C. Circuit's 2017 *Ali Jaber* Political-Question Extension: No Judicial Second-Guessing Whether President Barack Obama's Statements and Actions Against Muslim Aliens Abroad (Yemen) Was Mistaken or Justifiable 20

V. Alexander Bickel's Prudential Abstention Counsel 24

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES:

Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) 24

Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir. 2006) 5, 6, 23

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Boumediene v. Bush, 53 U.S. 723 (2008) 11

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Kleindienst v. Mandel, 408 U.S. 753 (1972) 11

Landon v. Plasencia, 459 U.S. 32 (1982) 10

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TABLE OF AUTHORITIES – Continued

Page

Mobarez v. Kerry, Civil Action No. 2015-0516 (D.D.C. 2016) 23, 24

Nixon v. United States, 506 U.S. 224 (1993) 16

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Page

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Page

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Page

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Page

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Page

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INTEREST OF THE *AMICUS CURIAE*

Victor Williams is a Washington, D.C. attorney and law professor with over twenty years' experience.[1] He has been formerly affiliated as fulltime faculty with both the Catholic University of America's Columbus School of Law and the City University of New York's John Jay College of Criminal Justice. He is founder and senior counsel of the America First Lawyers Association. (www.americafirstlawyers).

Professor Williams has particular knowledge and expertise regarding the text, history, and interpretation of Article II and Article III of the U.S. Constitution with many scholarly and popular publications. He earned his J.D. from the University of California, Hastings College of the Law. After completing an externship with both Ninth Circuit Judge Joseph Sneed and Eleventh Circuit Judge Gerald Bard Tjoflat, Williams took a two-year clerkship with Judge William Brevard Hand of the Southern District of Alabama. Williams did advanced training in federal jurisdiction and international law (LL.M.) from Columbia University's School of Law and in economic analysis of the law (LL.M.) from George Mason University's Antonin Scalia School of Law.

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[1] All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made monetary contributions to the preparation or submission of this brief. Institutional affiliation is for information purposes only. Professor Victor Williams lodged *amicus curiae* briefs in support of President Trump in the actions below.

Professor Williams has published scholarship and commentary that offered strong support for the constitutional discretion and appointment prerogatives of the past four presidents without regard to their party affiliation. Although these past presidents often pursued policy ends at odds with Professor Williams' personal policy preferences, he continued to defend their constitutional authority.

It was with great enthusiasm that Professor Williams was drawn to candidate Donald Trump's pragmatic "America first" and "forgotten American" agenda.[2] Williams was an early primary supporter of candidate Donald Trump. In spring 2016, Williams launched a widely-reported disruptive legal action to support Trump during the primaries.[3] After obtaining "competitor candidate standing" as a write-in candidate for

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[2] Victor Williams, *Law Professor Now in Basket of Deplorables*, THE HILL, Sept. 20, 2016, http://thehill.com/blogs/pundits-blog/presidential-campaign/296783-law-prof-once-an-obama-supporter-now-in-basket-of and Victor Williams, *Trump Will Bring Return to Rule of Law and Economic Growth*, THE HILL, Nov. 6, 2016, http://thehill.com/blogs/pundits-blog/presidential-campaign/304291 trump-will-bring-return-to-rule-of-law-and-economic.

[3] *See, e.g.*, Pema Levy, *Meet the Law Professor Who is Running for President to Get Ted Cruz Disqualified*, MOTHER JONES, Apr. 12, 2016, http://www.motherjones.com/politics/2016/04/lawsuits-ted-cruz-eligibility-president-canada-natural-born/; Debra Weiss, *Law Prof. Enters GOP Presidential Race to Challenge Ted Cruz's Eligibility*, ABA JOURNAL, Apr. 11, 2016, http://www.abajournal.com/news/article/law_prof_enters_gop_presidential_race_to_challenge_ted_cruzs_eligibility/; and Pete Williams, *Law Professor Challenges Cruz on Citizenship, Candidacy*, NBC NEWS, Apr. 11, 2016, http://www.nbcnews.com/news/us-news/law-professor-candidate-challenges-cruz-citizenship-n554046.

president in several late primary states, Williams challenged the ballot eligibility of (naturally-born Canadian) Ted Cruz.[4] After Senator Cruz withdrew from the GOP primary, Williams also withdrew from the race and formally endorsed Donald Trump. Williams then founded a Super PAC (GOP Lawyers), rallying lawyers and law professors to support Donald Trump in the general election. The campaign group has now transformed into the "America First Lawyers Association" (www.americafirstlawyers.com) to advance the Trump administration's nominations, policies, and programs.[5]

SUMMARY OF THE ARGUMENT

This litigation presents a nonjusticiable political question: "The conduct of the foreign relations of our Government is committed by the Constitution to the

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[4] *See* Jonathan Adler, *Law Professor Runs for President In Order to Challenge Ted Cruz's Eligibility*, WASH. POST, Apr. 9, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/09/law-professor-runs-for-president-in-order-to-challenge-ted-cruzs-eligibility/?utm_term=.1bab552d2507 and Stephen Dinan, *Hearing to Decide Ted Cruz Eligibility in New Jersey*, WASH. TIMES, Apr. 11, 2016, http://www.washingtontimes.com/news/2016/apr/10/hearing-to-prove-ted-cruzs-eligibility-for-new-jer/.

[5] *See, e.g.*, Victor Williams, *Madison, Hamilton, and Scalia: Original – Not Nuclear – End to Gorsuch Filibuster*, THE HILL, Apr. 6, 2017, http://thehill.com/blogs/congress-blog/politics/327504-madison-hamilton-and-scalia-original-not-nuclear-option-to-end and Victor Williams, *Scrap the Senate's 30-hour per Nominee Debate Rule to Clear Backlog of Trump Nominees*, THE HILL, Aug. 2, 2017, http://thehill.com/blogs/congress-blog/politics/344971-scrap-the-senates-30-hours-per-nominee-debate-rule-to-clear.

executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

In response to the Question Presented regarding justiciability, this *amicus curiae* argues separately that the judiciary does not have subject-matter jurisdiction to review the travel freeze challenges. A political-question determination should preclude a standing analysis, a mootness evaluation, or a merits review.

This Court has acknowledged the relationship between "decisions made by the Congress or the President in the area of immigration," and the "reasons that preclude judicial review of political questions." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977). An examination of the "amalgam of circumstances" of this litigation compels this Court's political-question determination. *See Zivotofsky v. Clinton I*, 566 U.S. 189, 1431 (2012) (Sotomayor, J., concurring).

The travel freeze policy is first and foremost about foreign relations. As a diplomatic entreat, the Executive Order is meant to lever our government's negotiations with foreign nations to secure those nations' cooperation with our vetting of their citizens who seek to visit America. The travel freeze policy is also a terror-war strategy aimed at preventing dangerous belligerents from alighting our shores. The travel freeze

is thus an integral constant in the new president's interrelated calculus of a foreign policy and war strategy shift.

These complicated diplomacies with foreign nations, most immediately with the six listed nations, "uniquely demand a single-voiced statement of the Government's views." *Baker v. Carr,* 369 U.S. 186, 211 (1962). By interfering with the foreign policy negotiations and war strategy, the courts below have violated the separation of powers and have caused substantial "embarrassment of our government abroad." *Id.* at 217.

All six *Baker v. Carr* formulations are found inextricably intertwined in an analysis of the instant challenges. 369 U.S. 186 (1962). The first two criteria of textual commitment and manageable standards are predominant. This Court has repeatedly acknowledged the textual commitment of foreign relations and war strategy to the elected political branches, and the lack of manageable standards for such judicial inquiry in these areas. Each of the later four *Baker* factors are also tangled in the analysis of the Executive's rationale and strategic tactical decision making that led to the travel freeze.

The D.C. Circuit offers a particularly helpful line of political-question analysis in cases challenging President Bill Clinton and President Barack Obama for making allegedly defamatory statements and taking allegedly unjustified actions against Muslim aliens abroad: "Courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political

branches in the realm of foreign policy or national security." *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (*en banc*). In its June 2017 *Jaber v. United States* ruling, the D.C. Circuit again explicitly refused to review presidential statements justifying actions taken against Muslim aliens abroad: "These Executive statements, however, do not constitute an invitation to the Judiciary to intrude upon the traditional executive role." *Jaber v. United States*, No. 16-5093 (D.C. Cir. June 30, 2017).

And the court acknowledged how such judicial restraint is constitutionally required "[h]owever sympathetic the allegations." *Id. See also Schneider v. Kissinger*, 412 F.3d 395 (D.C. Cir. 2005); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); and *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008).

When cogitating the myriad harms that could result from precedent allowing judicial interference in the president's foreign policy decisions and tactical war strategy, the prudential abstention caution of Alexander Bickel arises. *See* Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale, 1986).

ARGUMENT

Fulfilling his inaugural pledge, our new president invokes his Article II authorities to reorient America's

foreign policy and take charge of this nation's unusual, prolonged war with radical Islamic terrorists. In his first foreign trip, President Donald Trump previewed these policy changes in the epicenter of the terror war, and the Executive then went directly to Europe to inform allies.[6] The challenged Executive Order is implemented as an integral constant in this interrelated calculus of his foreign policy and war strategy shift.[7]

Although the broader policy objectives of the travel freeze are layered, one is patent and dynamic: To give all nations of the world – "friends and foes alike" – notice that America's interests now come first. By its explicit terms, the travel freeze may expand to include "the names of any additional countries recommended for similar treatment, as well as [to contract to remove] the names of any countries." Exec. Order No. 13780 (March 6, 2017). The travel freeze as policy thus applies – not just to majority Muslim nations where military action is presently ongoing but – to all nations of the world. The travel freeze as policy also applies to our European allies whose governments have so naively neglected their own border security. The travel freeze is a transparent diplomatic entreat to all nations to cooperate with our government so as to allow adequate vetting of their citizens who seek

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[6] *See generally*, Reuben Fischer-Baum and Julie Vitkovskaya, *How Trump is Changing America's Foreign Policy*, WASH. POST, July 25, 2017, https://www.washingtonpost.com/graphics/2017/world/trump-shifting-alliances/?utm_term=.9c391edb0536.

[7] Victor Williams, *Travel Ban Challenges Present a Non-Reviewable Political Question*, JURIST – FORUM, Feb. 15, 2017, http://jurist.org/forum/2017/02/Victor-Williams-travel-ban.php.

to visit America. (Iraq is an example of a nation who recently came into compliance through a close cooperative relationship and was thus dropped from the initial travel freeze list).

The foreign theater of the terror war is presently focused on nations in the Middle East and North Africa. Substantial military engagements are being escalated or planned by the Executive in each of the six nations presently listed in the travel freeze.[8] There is an unbroken chain of historic practice of presidents excluding entry of aliens abroad coming from war-zone nations. The travel freeze is a modest, even timorous, strategy in the terror war. It is not difficult to imagine more direct alternatives to implement the travel freeze

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[8] *See* Thomas Gibbons-Neff, *U.S. Troops Deployed to American Embassy in South Sudan*, WASH. POST, July 11, 2016, https://www.washingtonpost.com/news/checkpoint/wp/2016/07/13/u-s-troops-deployed-to-bolster-security-at-american-embassy-in-south-sudan/?utm_term=.074cf9b02c9a; Rebecca Khee, *Trump Gives Military More Authority to Launch Somalia Strikes*, THE HILL, Mar. 30, 2017, http://thehill.com/policy/defense/326565-trump-gives-military-more-authority-on-somalia-strikes; Rebecca Khee, *Trump Signals Deeper U.S. Involvement in Yemen*, THE HILL, Apr. 1, 2017, http://thehill.com/policy/defense/326767-trump-signals-deeper-us-involvement-in-yemen; Barbara Starr, *U.S. Military Considers Ramping up Libya Presence*, CNN, July 10, 2017, http://www.cnn.com/2017/07/10/politics/trump-us-military-libya-strategy/index.html; David M. Tafuri, *Why Trump's Attack on Syria is Legal*, POLITICO, Apr. 13, 2017, http://www.politico.com/magazine/story/2017/04/donald-trump-syria-attack-legal-215022; Sarah Westwood, *Trump Suggests Military Action Against Iran is Possible*, WASH. EXAMINER, Feb. 2, 2017, http://www.washingtonexaminer.com/trump-suggests-military-action-against-iran-is-possible/article/2613742.

policy in war-zone nations; the Executive has legal authority and at-the-ready modern weaponry abundant to eliminate every airport and transportation depot in each of the listed nations.

I. Nonjusticiable Political Question: Travel Freeze Is Integral to New Executive's Foreign Policy Reorientation and Terror War Strategy; Policy Choices Permeate Respondents' Challenges

President Donald Trump acts within his *inherent* Article II authorities in reorienting American foreign policy and developing unique war-strategy. This nation continues its seeming unending war with terrorists. At the same time, an ever-increasing, near-unlimited number of foreign-soil aliens, from the listed nations who are living in horrific conditions, understandably seek refuge on American shores. But it is "wholly outside the power of this Court to control," as Justice Felix Frankfurter wrote in his *Harisiades v. Shaughnessy* concurrence, the political branches "conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based." 342 U.S. 590, 596-97 (1952) (Frankfurter, J., concurring).

Again, the new Commander in Chief has planned or escalated military action for each of the six nations presently-listed in the travel freeze policy. And the

president, together with Congress, is reorienting foreign and economic policies regarding and impacting the most troubled of areas of the world including the six listed nations.[9]

The Acting Solicitor General convincingly argues that Respondents' challenges regarding entry of aliens abroad are without procedural foundation or substantive merit. As this Court ruled in *United States ex rel. Knauff v. Shaughnessy*, "[t]he exclusion of aliens is a fundamental act of sovereignty" that resides in the "legislative power" and also "is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. 537, 542 (1950). And this Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. at 792. *See also Landon v. Plasencia*, 459 U.S. 32 (1982). Indeed, President Donald Trump acts with

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[9] *See* Karen DeYoung, *U.S. Slaps New Sanctions on Iran*, WASH. POST, July 17, 2017, https://www.washingtonpost.com/world/national-security/us-certifies-that-iran-is-meeting-terms-of-nuclear-deal/2017/07/17/58d0a362-6b4a-11e7-b9e2-2056e768a7e5_story.html?utm_term=.196238eef969; Ben Fishman, *Could Italy Get Trump to Care about Fixing Libya*, FOREIGN POLICY, Apr. 20, 2017, http://foreignpolicy.com/2017/04/20/could-italy-get-trump-to-care-about-fixing-libya/; Al Mariam, *Trump's Suspicion of Foreign Aid to Africa is Right on the Money*, THE HILL, Mar. 9, 2017, http://thehill.com/blogs/pundits-blog/foreign-policy/323198-trumps-suspicion-of-foreign-aid-to-africa-is-right-on-the; John Prendergast, *Why Donald Trump Needs to Take Action on Sudan*, TIME, May 31, 2017, http://time.com/4798594/trump-sudan-sanctions-aid-corruption-terrorism/.

power "inherent in [the nation's] sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted).[10] Excluding aliens abroad is a plenary power of the president.

In response to the Question Presented regarding justiciability, this *amicus curiae* argues separately that the judiciary does not have subject-matter jurisdiction to review the travel freeze challenges. A political-question determination should preclude a standing analysis, a mootness evaluation, or a merits review.[11]

These matters "implicate our relations with foreign powers" and any competent judicial inquiry must extend to analysis of a "wide variety of classifications" understood only by the Executive "in the light of changing political and economic circumstances." *Fiallo v.*

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[10] Respondents' challenges do not involve aliens having been involuntarily taken to, and/or subject to detention on, American soil or on foreign soil over which America has "plenary or exclusive jurisdiction." *Rasul v. Bush*, 542 U.S. 446 (2004); *see Boumediene v. Bush*, 53 U.S. 723 (2008).

[11] In *Schlesinger v. Reservists To Stop the War*, this Court affirmatively noted: "The lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability was recently exhibited by the Court of Appeals for the Second Circuit, which bypassed a determination on standing to rule that a claim was not justiciable because it presented a political question." 418 U.S. 208, 215, n.5 (1974) (citing *DaCosta v. Laird*, 471 F.2d 1146, 1152 (2d Cir. 1973).

Bell, 430 U.S. at 796. The federal courts below were drawn into the most dense and ugly of contemporary political thickets. Resistance to Donald Trump's election and governance, of which this litigation is a component, is reaching historic intensity – save obviously the "resistance" after the 1860 election. It behooves this Court to make a political-question determination to insure finality in the instant cases, to retard other such resistance litigation, to honor the December 2016 choice of a majority of the States' electors in "maintenance of a republican form of government," and to acknowledge that it is the new president who has responsibilities to calculate war strategy and related foreign policy – not the unelected judiciary. *Harisiades v. Shaughnessy* 342 U.S. at 588-89.

In *Zivotofsky v. Clinton I*, this Court acknowledged that abstention is required when federal courts are "being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination." 566 U.S. 189, 196 (2012). Justice Stephen Breyer separately warned about exercising judicial review in foreign-policy matters involving the Middle East:

> Political reactions in that region can prove uncertain. And in that context it may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only

> whether but also the extent to which enforcement will interfere with the president's ability to make significant recognition-related foreign policy decisions.

Id. at 1440 (Breyer, J., dissenting).

Rather than merely touch on foreign relations, the instant litigation deeply impacts and directly challenges the new president's foreign-policy reorientations and war-strategy determinations. Policy choices, ideological preferences, and national-security judgments permeate judicial analysis of Respondents' challenges. *See Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

The Executive – not the judiciary – is constitutionally empowered to conduct negotiations with foreign nations to insure their cooperation with our alien vetting processes. Judicial interference with implementation of President Trump's travel freeze policy creates doubts among the international community as to the resolve of the United States in other foreign policy areas – such as those developing on the Korean peninsula. Beyond the unintended consequences of such interference lays the uncomfortable issue of judicial competence in foreign relations and war strategy:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. . . . They are decisions of a

> kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); *accord Haig v. Agee*, 453 U.S. 280, 292 (1981).

Goldwater v. Carter perhaps best exemplifies in the president's foreign relations discretion (treaty-abrogation) can have unknown consequences. 444 U.S. 996 (1979). It was without oral argument, or even waiting for merits briefing, that this Court ordered: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint." *Id.*

II. *Baker* Formulations Inextricably Intertwined with Travel Freeze Analysis

The traditional beginning point for a discussion of abstention understandings begins with U.S. Chief Justice John Marshall's early guidance as to the "rule of law to guide the court in the exercise of its jurisdiction." Marshall offered this political-question description: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his

political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165 (1803). Three years before, Representative John Marshall had warned his U.S. House colleagues that the political branches would be "swallowed-up by the judiciary" without such judicial self-restraint. *See* Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. app. note I, at 16-17 (1820) (cited by *The Political Question Doctrine and the Supreme Court of the United States* (Nada Mourtada-Sabbah and Bruce E. Cain, eds.) 25 n.10) 2007). On the very same day, Representative Marshall rearticulated his "sole organ" thesis of presidential power in foreign relations. *Id.*

Fast forward to *Baker v. Carr*'s reasoning that political-question abstention is "essentially a function of the separation of powers," 369 U.S. 186, 217 (1962), as Justice Sonja Sotomayor reaffirmed in her *Zivotofsky v. Clinton I* concurrence addressing a "demanding" inquiry needed for political question analysis. 566 U.S. 189, 1431 (2012) (Sotomayor, J concurring).

The travel freeze policy is first and foremost about foreign relations. As a diplomatic entreat, the Executive Order is meant to lever our government's negotiations with foreign nations to secure those nations' cooperation with our vetting of their citizens who seek to visit America. These complicated diplomacies "uniquely demand a single-voiced statement of the Government's views." *Baker,* 369 U.S. at 211. By interfering with these foreign policy negotiations and related war strategy, the courts below have violated the

separation of powers and have caused substantial "embarrassment of our government abroad." *Id.* at 217.

Abstention touchstones are laid by the six independent, disjunctive *Baker* formulations:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

All six *Baker* formulations are found inextricably intertwined in an analysis of the instant challenges. The first two criteria of textual commitment and manageable standards are predominant.[12] This Court has repeatedly acknowledged the textual commitment of

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[12] "[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon v. United States*, 506 U.S. 224, 228-29 (2003).

foreign relations and war strategy to the elected political branches, and the lack of manageable standards for such judicial activity in these areas. And it must be stated directly that the federal courts do not have better institutional ability, nor superior military instincts, nor more accurate classified information than does the Executive Branch in formulating such foreign policy or war strategy. Nor are judges able to *ex ante* predict the costs or consequences of interference in such Executive Branch policy determinations. A nonjusticiability finding is required where, as here, the judiciary "is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)).

Moreover, each of the later four *Baker* factors are also tangled in analysis of the Executive's policy rationale and strategic tactical decisions that led to the travel freeze. The courts below have boldly announced their own ideological and policy determinations. It has been with little respect shown to the coordinate political branch that the judiciary below second-guesses the president's judgment as to the wisdom, purpose, or need for the freeze. It has been with little respect shown that judges below devolve their inquiry into the president's alleged biased motivations for the travel freeze. After conflating the Office of President with the person of a presidential candidate, the unmoored judicial inquiry sank to the depths of campaign rhetoric in attempts to mine proof of religious bigotry. Such

strange non-juridical behavior examples a historic disrespect of the Executive branch.

With assertive invocation of universal, nationwide injunctions against the travel freeze, the trial courts below made "multifarious pronouncements" that disrupted "adherence" to the president's political decision already made. Even after this Court issued its stay pending a merits review, the Hawaii District Court again reasserted its power to second-guess the Executive's evaluation of certain classifications of foreign-soil aliens' alleged "bona fide" connection to America.

As did D.C. Circuit Judge Stephen Williams, when *Nixon v. United States* was below, it is important to emphasize the substantial finality value of a abstention determination: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment . . . the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991).

III. D.C. Circuit's *El-Shifa Pharmaceutical* Political-Question Analysis: President Bill Clinton's Allegedly Anti-Muslim Defamatory Statements and Actions Against Muslim Aliens Abroad (Sudan), Ruled Not Justiciable

The D.C. Circuit offers a helpful line of contemporary political-question authority: "Courts are not a forum for reconsidering the wisdom of discretionary

decisions made by the political branches in the realm of foreign policy or national security." *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (*en banc*). The *en banc* D.C. Circuit invoked the political-question doctrine to bring finality to a decade of litigation resulting from President Bill Clinton having described a Sudanese industrial enterprise, owned by wealthy Muslims, as being connected to radical Islam. Clinton repeatedly made these statements before – and after – destroying the Muslim-owned factory with military air strikes.

The factory owners claimed that President Clinton and senior administration officials defamed them based on the factory owners' Muslim faith and Muslim identity. The factory owners alleged the biased statements were made and the bombing was done for the rawest of political purposes. Plaintiffs framed the biased statements and the bombing as coming just days after Bill Clinton's grand jury testimony and public confession during the Monica Lewinski scandal. And the plaintiffs pointed to widespread speculation that President Clinton made the defamatory statements for personal political advantage to shift focus away from the escalating sex scandal.

The *en banc* D.C. Circuit resisted temptation to review the Executive's "justification" for the statements, refused to address whether the underlying strike decision was "mistaken," and refused to "determine[] the factual validity of the government's stated reasons" for the statements and actions. *Id.* at 844. The court stated:

> The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion. . . . The conclusion that the strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters. We must decline to reconsider what are essentially policy choices.

Id. at 842-43. The court recognized the unelected judiciary's limited role in our democratic Republic and thus refused to "expand judicial power at the expense of the democratically elected branches." *Id.* at 850.

IV. D.C. Circuit's 2017 *Ali Jaber* Political-Question Extension: No Judicial Second-Guessing Whether President Barack Obama's Statements and Actions Against Muslim Aliens Abroad (Yemen) Was Mistaken or Justifiable

In its June 2017's *Jaber v. United States* ruling, the D.C. Circuit reaffirmed and extended the *El-Shifa* political-question analysis. *Jaber v. United States*, No. 16-5093 (D.C. Cir. June 30, 2017). Yemeni nationals asserted claims, under international law, the Alien Tort Statute, and the Torture Victims Protection Act, resulting from deadly American signature drone strikes in Khashamir, Yemen. Salem Ali Jaber, a leading imam in

the port town of Mukalla, Yemen, and his son Walled, were killed in a 2012 American signature drone strike.[13] The imam and his family were visiting in Khashamir for a week-long wedding, and the imam gave a guest sermon at a local Khashamir mosque. Three local radical Islamic militants began stalking the imam to express their theological disagreement with his sermon.

Family-member plaintiffs alleged the American drone strike had targeted the behavioral and locational signature of three militants, and that Salem and Walled were innocent collateral victims of the strike. The family members sought a declaratory judgment determining that the killing of the imam Salem Ali Jaber and his son Walled Jaber violated international law and federal tort statutes. Their complaint emphasized Executive statements that were made to justify and promote the deadly drone strikes.

The D.C. Circuit ruled that it was not the judiciary's role to second-guess the determination of President Barack Obama that the national interest required a particular action against foreign-soil persons in the ongoing terror war. The court explained that the suit improperly called for the judiciary to pass judgment on the wisdom of a presidential decision – mistaken or not – regarding statements justifying and

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[13] With a signature strike, our government targets unidentified individuals solely based on patterns of where they live, with whom they associate, and behaviors associated with militants.

actions taken against foreign-soil aliens during the terror war. *Id.* And the court quoted from the complaint to explain the nature of the second-guessing that review would require. The court would have been required to second-guess whether:

- "[n]o urgent military purpose or other emergency justified" the drone strike, JA 10;
- killing the alleged targets was not "strictly unavoidable" to defend against an "imminent threat of death" to the "United States or its allies," JA 36-37; and
- the risk to nearby civilians was excessive in comparison to the military objective since "there [was] no evidence" the three men were "legitimate military targets," and "there were no U.S. or Yemeni forces or military objectives in the vicinity that were in need of protection against three young Yemeni men," JA 38.

Id. (quoting plaintiffs' complaint).

The D.C. Circuit again resisted temptation to review presidential statements made regarding the policy decision: "These Executive statements, however, do not constitute an invitation to the Judiciary to intrude upon the traditional executive role." *Id.* And the court acknowledged how such judicial restraint was constitutionally required "[h]owever sympathetic the allegations." *Id.* For earlier D.C. Circuit rulings analyzing the political-question doctrine in the foreign relations/national security context, *see Schneider v. Kissinger*,

412 F.3d 395 (D.C. Cir. 2005); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); and *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008).

Relying on the abstention wisdom of *El-Shifa Pharmaceutical Industries*, the District Court for the District of Columbia in 2016 rejected review of claims from American citizens that arose in Yemen. When closing the U.S. Embassy in Yemen, President Barack Obama had refused to facilitate the exit and safe travels of American citizens from the horrific conditions in Yemen back to American soil. Notwithstanding the compelling emotional arguments made by, and the exacting statutory claims of, the Muslim-American citizens, the District Court refused to review such claims.[14] The trial court artfully explained why such inquiry and analysis would have required the court to answer a political question:

> But the question that Plaintiffs' APA claim poses is not just what these provisions mean; it is also whether, if they mean what Plaintiffs say they mean, the Executive has violated the mandate that these provisions establish, and it is that aspect of the court's inquiry that would necessarily require the court to answer a non-justiciable political question.

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[14] In both *Jaber* and *Mobarez*, the courts relied on this Court's *Zivotofsky I* analysis, to explain why political-question abstention was required notwithstanding the plaintiffs' styling of their cases as based on federal statutes, executive orders, or random presidential statements.

Mobarez v. Kerry, Civil Action No. 2015-0516 (D.D.C. 2016). For additional political-question analysis of the District Court of the District of Columbia, *see Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

V. Alexander Bickel's Prudential Abstention Counsel

In view of the judge-centric consciousness so predominant at bar and in the legal academy, perhaps less "domesticated" abstention advocacy is needed to counsel the judiciary's self-restraint; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability still incubates in Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. Professor Bickel described political questions as those issues which ask the courts to evaluate policy and choose between outcomes – functions which the judiciary as an institution is functionally incompetent to carry out.

In unmatched written aesthetic, Alexander Bickel offered an abstention foundation instead of *Baker*-like criteria:

> In a mature democracy, choices such as this must be made by the executive . . . Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which

> tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (Yale 1986).

The late Yale University law professor's prudential poetry begs for this Court's deep consideration of its foundational truth. When cogitating the myriad harms that could result from precedent allowing judicial interference in the president's foreign policy decisions and tactical strategy in the terror war, it is disturbingly prescient that Professor Bickel addressed "*the anxiety, not so much that the judicial judgment will be ignored but that it should but will not be.*" *Id.* (emphasis added).

CONCLUSION

As the nation's unusual war with radical Islamic terrorists continues, our new president reorients the Republic's foreign policy and military strategy. The challenged Executive Order is needed to lever the administration's diplomatic negotiations with foreign nations, most immediately the six listed nations, so as to

secure those nations' cooperation with our government's vetting of their citizens who seek to alight our shores. The travel freeze is thus an integral constant in the administration's interrelated calculus of a foreign policy and war strategy shift.

Our federal judiciary has its own high duty to perform in the terror war – political-question abstention.

Respectfully submitted,

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